

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Estate of Betty L. Carley
Northwoods Ford
323 Woodland Heights Ter
Rhineland WI 54501-3669

PECFA Claim #54501-3618-12
Hearing #96-133

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed January 30, 1996, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce (Department), a hearing was commenced on February 10, 1997, at Madison, Wisconsin. A proposed decision was issued on August 18, 1997, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the Department's decision dated January 24, 1996 was incorrect as to the denial of a request by the Appellant for reimbursement in the amount of \$120,210.76 under the Petroleum Environmental Cleanup Fund Act ("PECFA").

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Estate of Betty L. Carley
Northwoods Ford
323 Woodland Heights Ter
Rhineland WI 54501-3669
By: Pamela L. Gergens
Michael Best & Friedrich
100 E Wisconsin Ave
Milwaukee WI 53202-4108

Charles V. Sweeney
Michael Best & Friedrich
P.O. Box 1806
Madison WI 53701-1806

Department of Commerce

PECFA Bureau
201 West Washington Avenue
P.O. Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm. 623
P.O. Box 7970
Madison WI 53707-7970

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 6, 1997.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated August 18, 1997 are hereby adopted for purposes of this final decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated August 18, 1997 are hereby adopted for purposes of this final decision.

DISCUSSION

The Discussion in the Proposed Decision dated August 18, 1997 is hereby adopted for purposes of this final decision.

FINAL DECISION

The Proposed Decision dated August 18, 1997 is hereby adopted as the final decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, P.O. Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, P.O. Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: June 11, 1998

Christopher C. Mohnnan
Executive Assistant
Department of Commerce
P O Box 7970
Madison WI 53707-7970

cc: Pamela L. Gergens
Charles V. Sweeney
Kristiane Randal
Dispute Resolution Coordinator, PECFA

Date Mailed: June 24, 1998

Mailed By: Diane Castillon

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Betty Carley
Northwoods Ford
323 Woodland Heights Ter
Rhineland, WI -04501-3669

Appellant,
vs.
Wisconsin Department of Commerce

PECFA CLAIM /354501-3618-12

Hearing #96-133

Respondent

PROPOSED DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Richard C. Wegner, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

HEARING EXAMINER:
Arthur J. Schneider

DATED AND MAILED:
August 18, 1997

MAILED TO:

Appellant Agent or Attorney

Attorney Charles V. Sweeny,
Attorney Pamela L. Gergens,
Michael, Best and Friedrich
100 East Wisconsin Avenue
Milwaukee, WI 53202-4108
(414) 271-6560

Respondent's Attorney

Attorney Kristiane Randal
Assistant Legal Counsel
P.O. Box 7946
Madison, WI 53707-7946
(608) 267-4433

PRELIMINARY RECITALS

Pursuant to a petition filed on January 30, 1996, under Section 101.02(6)(e), Wis. Stats., and Section ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on February 10 and 11, 1997, at Madison, Wisconsin, before Arthur J. Schneider, Administrative Law Judge.

The issue for determination is

A. Whether the Department's decision dated January 24, 1996, was incorrect as to the denial of a request by the appellant for reimbursement in the amount of \$120,210.76 under the Petroleum Environmental Cleanup Fund Act ("PECFA").

PARTIES IN INTEREST:

Betty Carley,
Northwoods Ford
323 Woodland Heights Ter
Rhineland, WI 54501-3669

Attorney Thomas J. Basting Jr.
Michael, Best & Friedrich
100 E. Wisconsin Ave.
Milwaukee, WI 33202-4108
(414)271-6560

Environmental Regulatory Services Division
210 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-79G9
by: Attorney Kristiane Randal
Assistant Legal Counsel

FINDINGS OF FACT

Since 1961, an automobile dealership and other businesses have been located at 323 Woodland Heights Terrace, Rhineland, Wisconsin (the site). The appellant, Betty Carley and her husband, Jere Carley, operated a dealership known as Carley Ford, Lincoln, Mercury, Inc. ("Carley Ford") at the site from 1971 through 1978. The appellant and her husband divorced in 1978 and Mr. Carley continued operating Carley Ford until 1980.

During January of 1980, Mr. Carley ceased the operation of Carley Ford at the site. A series of automobile dealerships then occupied the site until 1989. At that time Mr. Carley defaulted on payments agreed upon under the divorce settlement with Betty Carley. The appellant then foreclosed on the site. She later leased the site to other automobile dealers until the most recent dealer, Northwoods Ford, moved the business to another location.

On or about: February 11, 1992, the appellant received a petroleum environmental cleanup fund act (PECFA) eligibility letter for the site from the department. She then authorized Fluid Management, Inc. ("FMI") to conduct a PECFA site investigation and complete a Remedial Action Plan ("RAP"). FMI concluded that soil and ground water contamination was present in the area of the 8, 000 gallon #2 diesel fuel underground storage tank ("UST") which had been located on the site.

There had been three USTs located at the site: (1) one 8,000 gallon #2 diesel fuel UST located on the east side of the building at the site; (2) one 2,000 gallon gasoline UST located on the west side of the building; and (3) one 275 gallon waste oil UST located on the east side of the building. All three USTs were removed from the site in 1990.

A ground water remediation plan was submitted by FMI to the Wisconsin Department of Natural Resources ("WDNR") and it concurred with that plan. The system operated until July of 1995 at which time the groundwater was successfully remediated to WDNR standards.

During February of 1995 the appellant had submitted a progress payment request in the amount of \$120,210.76 to the department for reimbursement under the PECFA program for cost incurred through the construction of the remedial system. On or about January 24, 1996, the department informed the appellant that the entire PECFA claim of \$120,210.76 was disqualified for reimbursement because the release at issue was from an ineligible tank system. The department was referring to the 8,000 gallon #2 diesel UST. The appellant has appealed that denial of its request for reimbursement.

DISCUSSION

The issue to be decided is whether the department's decision dated January 24, 1996, was incorrect as to the denial of a request by the appellant for reimbursement in the amount of \$120,210.76 under the Petroleum Environmental Cleanup Fund Act ("PECFA").

Section 101.143(1)(fg) , stats., defines a "petroleum products storage system" to mean:

a storage tank that is located in this state and is used to store petroleum products together with any on-site integral piping or dispensing system. The term does not include pipeline facilities; tanks of 110 gallons or less capacity; residential tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale; farm tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale, except as provided in sub. (4)(ei); tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and heating oil tanks owned by technical college districts and except as provided in sub. (4)(ei); or tanks owned by this state or the federal government.

The parties have agreed that the 8,000 gallon UST was used to store a grade of diesel fuel which could be used for both heating and as a fuel in diesel vehicles. The parties also agreed that if the diesel fuel was dispensed as a vehicle fuel the 8,000 gallon UST site clean-up would be eligible for PECFA reimbursement funds.

The appellant contends that some of the diesel fuel was actually dispensed as a vehicle fuel into diesel vehicles and the 8000 gallon UST therefore meets the definition of a "petroleum products storage system" such that it qualifies for PECFA reimbursement funds. Specifically, it can be determined that diesel fuel was dispensed from the 8,000 gallon UST from the following: the 8,000 gallon UST was located at an automobile dealership and it is common practice for automobile dealerships to dispense diesel fuel into vehicles; if tax records could have been found, they would have shown that diesel fuel was

used for vehicles and a diesel fuel dispenser was located near the 8,000 gallon UST. These contentions cannot be sustained. The burden of proof for proving that the 8,000 gallon UST was used to dispense diesel fuel into vehicles such that the UST was eligible under the PECFA program was upon the appellant. The appellant has not met that burden of proof.

In prior decisions the department has determined that the applicant for PECFA funds generally has the burden of proof both at the hearing and also in the application for reimbursement. See, e.g., Danco Prairie FS Cooperative (Final Decision, 10/17/94) and Harold Born v. Dept. of Commerce (Final Decision, 3/13/97). In a situation where evidence has been unavailable through the fault of someone other than the claimant, the claimant has nevertheless ailed in its burden of proof. See, e.g., Vern Dahl v. DILHR (Final Decision, 3/29/96) in which tank removal costs were denied because the claimant was "not able to provide itemized documentation of the amounts charged by the contractor in removing the underground storage tanks from the Lapham Blvd. property because the contractor lost those records. Proposed decision at 3. See, also, Waukesha County v. DILHR (Final Decision, 3/28/96) in which the claimant failed to provide subcontractor invoices to document the exact nature of services and expenditures.

The statutes exclude from payment under the PECFA fund all costs which are determined for site remediation which are not covered by the PECFA program. In this case, the appellant has failed to show that diesel fuel was dispensed from the 8,000 gallon UST into vehicles. If the operators of the businesses which had the 8,000 gallon UST under their control had used the diesel fuel for vehicle fuel it would be reasonable to assume they would have kept records concerning the use of the fuel for that purpose including vehicle fuel tax records. The failure of the appellant to present such records does not mean they exist but could not be found. Rather, the failure to present such evidence raises a legitimate doubt as to their existence.

The mere fact that a non working diesel fuel dispenser was found near the 8,000 gallon UST site also does not provide sufficient evidence to find that diesel fuel was dispensed from it from the UST into diesel vehicles. It would be more reasonable assume that if the dispenser was used to dispense diesel fuel it would have been in working condition and connected to the UST. Again the lack of such evidence raises the legitimate doubt as to its use for the purpose alleged by the appellant.

The appellant- asks the appeal tribunal to recognize the common practice of automobile dealerships to dispense diesel fuel. The appeal tribunal cannot determine from the evidence that it was or is the common practice of automobile dealerships to dispense diesel fuel. It was not shown by the evidence presented that automobile Dealerships located on or near the site needed diesel fuel for vehicles. If diesel fuel was needed for vehicles it also was not shown how it was obtained or dispensed into vehicles. For example, it would be just as reasonable to assume that an automobile dealership could find it more convenient and cost effective to rely upon a gas station which carried diesel fuel to supply its diesel fuel dispensing needs.

The appellant asserted that all of these circumstances be considered together and the conclusion drawn that diesel fuel was dispensed from the 8,000 gallon UST into vehicles. However, all these allegations taken together could also lead to the conclusion that diesel fuel was not dispensed from the 8,000 gallon UST because: it was only used to store heating fuel; the tax records are not available because they do not exist; no witnesses are available because diesel fuel had never been pumped from the 8,000 gallon UST into vehicles; and the diesel fuel dispenser was located near the UST instead of hooked up to it because it had never been hooked up to that unit and was merely lying around as a "junk" item. The appellant has failed to meet its burden of proof. The department correctly denied the appellant's request

for reimbursement in the amount of \$120,210.76 under the Petroleum Environmental Cleanup Fund Act for the remedial costs associated with the 8,000 gallon UST.

CONCLUSIONS OF LAW

The department properly denied reimbursement in the amount of \$120,210.76 for the costs associated for the contamination cleanup associated with the non-residential 8,000 gallon heating oil UST, within the meaning of section 101.143(4) of the statutes and ILHR 47.02(3)(f) of the Wisconsin Administrative Code and ILHR 47.30 of the Wisconsin Administrative Code.

PROPOSED DECISION

The decision of the Department of Commerce, dated January 24, 1996, denying the appellant's request for reimbursement in the amount of \$120,210.76 under the PECFA program is affirmed.

Dated this 15th day of August, 1997.

APPEAL TRIBUNAL

by Arthur J. Schneider
 Administrative Law Judge
 Madison Hearing office
 1801 Aberg Avenue, Suite A
 P.O. Box 7975
 Madison, WI 53707-7975